University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School.

$4.50 PER ANNUM; FOREIGN, $5.00; SINGLE COPIES, 65 CENTS.

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ANNOUNCEMENT.

The Review announces the election of Irwin F. Holt of the Third Year Class to the Editorial Board.

NOTES

ASSOCIATION DISTINGUISHED FROM TRUST UNDER FEDERAL TAX LAW—The appearance of the word "association" in numerous statutes,[1] and the absence of any generally recognized and exact conception of the scope of that term [2] has been the fountain of much vigorous litigation in recent years. A body of persons whose status is not covered exactly by the terms "corporation," "joint stock company," "insurance company" or "partnership," faces a real and very practical difficulty each time it is obliged to file a return under the *Federal Revenue Act*.[3] A Massachusetts or business trust is just such a body.[4] Occupying a position midway between corporations and partnerships on one hand, and pure trusteeships on the other, there

[1] The Federal Revenue Acts, Anti-trust Law, Firm Name Statutes, Blue Sky Laws and Uniform Partnership Act, are some examples. The Federal Bankruptcy Act uses the words "unincorporated company" which have by judicial definition been made equivalent to "association." *In re* Associated Trust, 222 Fed. 1012 (D. C. Mass. 1914). *Cf.* United Mine Workers v. Colorado Coal Co., 259 U. S. 344 (1922).

[2] "The term 'association' has not acquired a technical legal meaning which can safely be stated in the form of a definition. In philosophy of law it has been used sometimes to describe all cohesive groups of individuals whether or not endowed by the state with the conception of artificial entity." WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS (2d ed. 1923) 1.

[3] Section 1 of the Revenue Act of 1918, 40 STAT. 1057 (1919), U. S. C. (1925) TIT. 26, § 931, section 2 of the Revenue Act of 1921, 42 STAT. 227 (1921). U. S. C. (1925) TIT. 26, § 1262, and section 2 of the Revenue Act of 1924, 43 STAT. 253 (1924), U. S. C. (1925) TIT. 26, § 1262, provide that "when used in this Act . . . the term 'corporation' includes associations, joint stock companies, and insurance companies." Corporations, partnerships and trusts are designated by the statute as being each in a special status with respect to the income tax. Partnerships as such do not pay a tax.

[4] The Massachusetts trust is a creation of the profession in Massachusetts designed originally to supply a means not available under the corporation law of that state of quasi-corporate dealings with real estate holdings; transferable certificates of beneficial interest taking the place of stock. Their origin has been likened in purpose to the origin of the trust of old. They have thrived so well as to be carried into other fields where corporate advantages without the burdensome disadvantages were desired. The field of activity of the Massachusetts trust is by no means confined to Massachusetts. For a close description, discussion and analysis, together with collection of forms see WRIGHTINGTON, *op. cit. supra* note 2, *passim*. See also Cook, *The Mysterious Massachusetts Trusts*, (1923) 9 A. B. A. JOUR. 763; Magruder, *The Position of Shareholders in Business Trusts*, (1923) 23 COL. L. REV. 423; containing, p. 424, n. 7, a reference to some of the literature on the subject. See also Note (1926) 24 MICH. L. REV. 599.

has been no little confusion in ascertaining the precise point at which the terms of the declaration of trust contain adequate provisions to constitute the organization an "association" and so make it taxable as a corporation. That some rational test still remains a desideratum in the construction of the *Revenue Act* is emphasized by the appearance of two recent opinions on the status of business trusts which establish different criteria for the ascertainment of the necessary characteristics, and which, when applied, result in different conclusions.

The case of *Hornblower v. White* [5] decided that a certain operating business trust was not an association subject to the stamp tax on the issue of stock by a corporation imposed by the *Revenue Acts of 1918 and 1921*. The trust involved was organized to assume the direction of a land development company which had gotten into financial difficulties. The declaration of trust set forth that the three trustees were to take title to the property for the purpose of reducing it to cash within twenty years. Vacancies in the office of trustee were to be filled by the remaining trustees. The provisions of trust could be modified by the trustees if assented to by a majority of the certificate holders. The court distinguished the trust therein involved from that in *Hecht v. Malley* [6] on the ground that "the only power which the beneficiaries in the present case had was to assent to a modification of the declaration of trust suggested by the trustees." They believed such negative control did not make out of the express trust a voluntary association under the laws of Massachusetts,[7] and hence was not contemplated within the terms of the Revenue Acts.

Simultaneously there appeared an opinion of the General Counsel of the Bureau of Internal Revenue [8] that a certain operating business trust was an association within the meaning of the *Revenue Acts of 1918 and 1921*. The body was organized under a declaration of trust by which title to all the property to be administered in carrying out the general business projected by the terms of the trust, was given to a single trustee. The power to dissolve the trust, distribute earnings, or partition trust property was given unreservedly to the trustee. The substance of the opinion is that so long as the trust is organized for the purpose of carrying on a business for profit, and it is conducting the business in the manner and form of a corporation, the measure of control vested and exercised by the beneficiaries is immaterial. The character of this organization that gave it quasi-corporate form was the issuing of "negotiable certificates of beneficial interest similar to shares of stock," and, under the counsel's

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[5] 21 F. (2d) 82 (D. C. Mass. 1927).

[6] 265 U. S. 144 (1924).

[7] Bouchard v. First People's Trust, 253 Mass. 351, 148 N. E. 895 (1925), was cited in support.

[8] G. C. M. 2405, reported in UNITED STATES DAILY, Oct. 19, 1927, at 2358.

interpretation of the case of *Hecht v. Malley,* the fact that there was only one trustee did not take away the quasi-corporate form merely because it was not possible for trustees to associate together in a manner similar to that of directors.

It is apparent that the two opinions offer not only two different conceptions of the term "association," but indicate two different views of a single court decision—*Hecht v. Malley.* Preliminary to any attempt to ascertain a logical gauge by which "non-association" may be differentiated from "association" it is necessary to examine the present state of the law as indicated by the decided cases.

The leading case on the subject, *Crocker v. Malley,*[9] decided that a certain holding trust (holding, in the sense that the trustees were merely holding land and stock of a corporation which leased the land for the collection of income and ultimate conversion into money to be distributed to the certificate holders) was a strict trusteeship under Massachusetts law and as such could not be taxed as an association under the revenue laws. Mr. Justice Holmes took the existing orthodox Massachusetts view that if the shareholders have little or no control, direct or indirect, this indicates a trusteeship.[10] The beneficiaries had no more than negative control in two respects, *viz.,* trustees had to secure their consent to fill a vacancy among the trustees, or to modify the terms of the trust. Hence the court concluded there was not such an association among the beneficiaries as results in joint action and interest, and of control by them over the fund. No emphasis was laid upon the character of the activity of the trustees—so that apparently holding trusts would not be distinguished from operating trusts. It has been suggested by a learned writer[11] that the test of "association as results in joint action and interest" embodies correct legal theory (since that accords with the test adopted by courts in determining whether a business trust is to be deemed a partnership or some other legally recognized form of organization); while control is merely a factor in determining the existence of the requisite association.

In *Hecht v. Malley,* the latest utterance[12] of the Supreme

[9] 249 U. S. 223 (1919), reversing 250 Fed. 817 (C. C. A. 1st, 1918). Followed in Chicago Title & Trust Co. v. Smietanka, 275 Fed. 60 (D. C. Ill. 1921); Weeks v. Sibley, 269 Fed. 155 (D. C. Tex. 1920). See also Greene County v. Smith, 148 Ark. 33, 228 S. W. 738 (1921).

[10] The problem of distinguishing a trust from a partnership had frequently been considered by Massachusetts and English courts. The cases are reviewed in the opinion of Loring, J., in Williams v. Milton, 215 Mass. 1, 102 N. E. 355 (1913). See also Betts v. Hackathorn, 159 Ark. 621, 252 S. W. 602 (1923); Wells v. Mackay Telegraph-Cable Co., 239 S. W. 1001 (Tex. Civ. App. 1921); Moorehead v. Greenville Exchange National Bank, 243 S. W. 546 (Tex. Civ. App. 1922).

[11] Rottschaefer, *The Massachusetts Trust Under the Federal Tax,* (1925) 25 COL. L. REV. 305, in which appears a very lucid analysis of the whole problem.

[12] In Burk-Waggoner Assn. v. Hopkins, 269 U. S. 110 (1925), organizations like those involved in the *Hecht* case without further analysis were held taxable as corporations. For discussion of this case see *infra* note 24.

Court on the characteristics of a trust that make it an association under the acts, three Massachusetts trusts were found to be associations under the *Revenue Act of 1918*. The emphasis was laid upon two factors: the trust was operating in carrying on a business; there existed quasi-corporate form, the significant factor in this respect to Mr. Justice Sanford's mind being the fact that the trustees were "associated together in much the same manner as directors in a corporation." Control by association among the beneficiaries was not deemed a requisite since the trusts were declared to be associations "independently of the large measure of control exercised by the beneficiaries." [13]

The *Hecht* case purported to distinguish and not to overrule the *Crocker* case,[14] but some of the grounds are illy conceived, and it is the opinion of some learned law writers that the "*Hecht* case indicates a trend whose logical extension may effectually overrule the *Crocker* case under the form of a limitation of its scope to cases on all fours with it." [15] The definitive section [16] of the Act gives to corporations a meaning that is to be applied throughout all sections of the act. The probability being that the court will attempt to establish uniform tests applicable under any title of the *Revenue Act,* it is not rational to suppose that the test of the *Crocker* case will apply to income tax (for that is the title under which that case was decided) while the test of the *Hecht* case is to apply to the capital stock tax. In *Malley v. Bowditch,*[17] a case involving a tax on the stock of every "association,

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[13] Two of the trusts, the "Haymarket Trust" and the "Hecht Real Estate Trust," would clearly be associations under the principles of the *Crocker* case. In the "Massachusetts Realty Trust" there is room for more doubt, since the only power in beneficiaries was to remove trustees, and to fill any vacancies that occurred. But as Rottschaefer, *op. cit. supra* note 11, points out, it is the reasoning more than the decision that is significant.

[14] The language of Sanford, J., 265 U. S. at 160, after stating that Crocker v. Malley held that the act did not make a Massachusetts trust subject to a tax upon dividends received from a Massachusetts corporation that was itself subject to tax, is: "This opinion is based primarily upon the view that the Income Tax Act, considering its purpose, did not show a clear intention to impose upon the trustees as an 'association' a double liability in reference to the dividends on stock in the corporation that itself paid an income tax, when considered as 'trustees' they were by another provision of the act exempt from such liability. And the language used *arguendo* in reaching this conclusion that the trustees could not be deemed an association unless all trustees with discretionary power are such, and that there was no ground for grouping together the beneficiaries and trustees in order to turn them into an association—is to be read in the light of the trust agreement there involved, under which the trustees were in substance merely holding property for the collection of income and its distribution among the beneficiaries and were not engaged either by themselves or in connection with the beneficiaries in carrying on any business."

[15] Rottschaefer, *op. cit. supra note* 11. See also opinion of WRIGHTINGTON, *op. cit. supra* note 2, at 55 on cases decided since Crocker v. Malley.

[16] *Supra* note 3.

[17] 259 Fed. 809 (C. C. A. 1st, 1919), distinguishing Eliot v. Freeman, 220 U. S. 178 (1911).

company or corporation," the court found that the operating trust involved was a "company," emphasis being placed on the fact that the trustees were designated to carry out the business of manufacturing. This was a step in the direction of the test apparently adopted in the *Hecht* case and perhaps indicates an eventual adoption for all purposes of the tests of that case. The Treasury Department in its administrative regulations has already adopted[18] them. Our problem concerns the probability that the courts will sustain such regulations. The eventual adoption of the tests of the *Hecht* case—(a) scope of the trust activities, (b) quasi-corporate form of organization—would have been more probable if the distinction drawn between that case and the *Crocker* case had been based on a correct interpretation of the latter's reasoning.[19] In the confusion of the decisions both the *Hornblower* case and the General Counsel's opinion can be plausibly maintained. The only way a rational test may be devised is by an inquiry afresh into the logic of the situation.

A careful analysis[20] of the problem seems to lead to the following conclusions: Of the three possible groups involved in a trust, (a) the trustees, (b) the beneficiaries, (c) the trustees and beneficiaries combined, it is the characteristic of the beneficiaries solely that will determine the status of the trust under the Revenue Act, for they are the ones who are supposed to be the *socii*.[21] In examining this group, the test of "joint action and interest" of the *Crocker* case, though sound because the word association itself connotes community of purpose and action, applies equally to every group of persons who act as an entity, as for example a partnership; but all are not taxed as associations. Logically, therefore, the taxability of a group enterprise as an association should depend on the form used to effect its group purpose. Since the associations are taxed as corporations, their simi-

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[18] Treasury Dept. Regulations under Act of 1926 (Regulations 69, Articles 1502 and 1504). Under the regulations it is pointed out (KIXMILLER & BAAR, INCOME AND WAR TAX GUIDE, [1927] 5529) that it is not yet definitely decided what is the status of either (a) a trust which is not organized in quasi-corporate form and is not under the control of the beneficiaries but which is engaged in carrying on a business, or, (b) a trust which is organized in quasi-corporate form but is not engaged in carrying on a business, and is not under the control of the beneficiaries. For full discussion of the Treasury Department's former position see MONTGOMERY, INCOME TAX PROCEDURE (1924) 44-48.

[19] See *supra* note 15. The incorrect interpretation of the Crocker case consists in the emphasis laid on intent not to impose double taxation. This reason was not the basis of the Crocker case, but was merely added to show that nothing in the tax law required the court to depart from the status found under general principles of law.

[20] These conclusions stated are those that are reached by the careful study Rottschaefer, *op. cit. supra* note 11.

[21] This is the group determined upon in William v. Milton, *supra* note 10, and Smith v. Anderson, L. R. 15 Ch. D. 247 (1880), the leading English case. It is the construction which best fits the Revenue Act in all its sections. It places stockholders in a position similar to that of the beneficial certificate holders.

larity in organization—their quasi-corporate form—should be the determinates. Of the factors in a corporation which distinguish it from a trusteeship,[22] the significant one is the fact that the board of directors acts as the agent for the shareholders and not, as the *Hecht* case seems to imply, "that directors associate together to conduct business." The control exerted by beneficiaries is a direct factor bearing on the existence of this important characteristic of quasi-corporate form. Logically the test of "scope of activities" has no basis. A corporation is taxed equally whether it is an investment or holding body, or business conducting body. It is the form in which the group ambition is realized that makes it amenable to the tax law, not the nature of the ambition. Therefore the only requirement is that a business trust have quasi-corporate form, and one of the indices of that form is control among the beneficiaries.

The *Hornblower* case, in the light of what has been said, appears to be a correct decision. It is the reasoning of the case that is open to objection. The first objection, not a logical one, but one of judicial interpretation of precedent, is that the court misconstrues the *Hecht* case and indicates a reaction from what seemed the trend since the *Crocker* case. The second objection arises from the suggestion in the case that only when an organization is dealt with as an association in the state of its domicile should it be so dealt with under the Revenue Acts. The practical difficulty with this is that it would add chaos to already existing confusion in states where the jurisprudence on the subject is not as highly developed as it is in Massachusetts.[23] In addition, there is the theoretical objection that the word association as used in the act is not a technical word. All states which have adopted the *Uniform Partnership Act* by statute make an association of every partnership, yet these are not taxed as corporations.[24] The state law regulates the incidents of organization, *i. e.*, it decides the obligations of trustees to beneficiaries and to third parties. But taxability is not put on the basis of these incidents.[25] It is the mobilization of capital for purposes of profit in a

[22] The important features of corporate existence are pointed out to be (1) a division of interest in fractional shares represented by freely transferable shares, (2) indefinite existence, (3) immediate control of enterprise by a board that acts, in the final analysis as agent of the holders of its shares to whom it is responsible, (4) enforcement of that responsibility through formal group action, (5) ultimate control of the enterprise by shareholders, secured through group action.

[23] There is no uniformity among the decisions of the states, or even within a given state. See WRIGHTINGTON, *op. cit. supra* note 2, § 13.

[24] It is apparent that the word as used in the Uniform Partnership Act is not the same as in the Revenue Act. In criticism of the former see Crane, *Uniform Partnership Act,* (1915) 28 HARV. L. REV. 762.

[25] *Cf.* Burk-Waggoner Assn. v. Hopkins, *supra* note 12. The contention made in this case was that the trust had been declared a partnership in Texas and hence not liable to taxation. But the court held that §§ 218 (a) and 335 (c) refer only to ordinary partnerships and that within the Act this trust was an asso-

certain form that gives the impulse to tax, and the treatment by the Federal Government of that form cannot be affected by the states' treatment.

The Opinion of General Counsel was concerned primarily with the sole trustee who carried on the business. In deciding that the existence of a single trustee was not incompatible with the existence of quasi-corporate form, there was a logical departure from the inferences arising from the language, and from the language itself, of the *Hecht* case. In theory the decision is correct and enlightening because it emphasizes the fact that even though there are no corporations which have but a single director, it is not the associating together of directors that is a significant factor of corporate existence. As has been explained, it is the acting as agent for a group to whom the agent is responsible that marks corporate form. Practically considered, the decision destroys what would be an easy method for preventing the application of the law to a trust which legitimately falls within the terms of the act structurally considered. The objection to the opinion is that it adopts the "scope of activities" test of the *Hecht* case. This, as has been shown, bears no relation to quasi-corporate form, and though it definitely represents the attitude of the administrative officials it may well be disregarded by courts in the future.

In conclusion it might be noted that as a matter of statutory construction the courts need feel very little hampered by the terms of the Act. Association, undefined, is sufficiently nebulous a term as to include any organization involving a number of persons who seek as a group to accomplish an object that may result in profit to them individually. Business trusts are being increasingly regulated along the lines of corporations.[26] The problem before the Supreme Court when it arises will be more a problem of taxation policy than of judicial interpretation.

J. R. C.

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ciation. The language of Brandeis, J., 269 U. S. at 114, is conclusive on the question under consideraion. "But nothing in the Constitution precludes Congress from taxing as a corporation an association which, although unincorporated, transacts its business as if it were incorporated. The power of Congress so to tax associations is not affected by the fact that, under the law of a particular State, the association cannot hold title to property, or that its shareholders are individually liable for the association's debts, or that it is not recognized as a legal entity. Neither the conception of unincorporated associations prevailing under the local law, nor the relation under that law of the association to its shareholders, nor their relation to each other and to outsiders, is of legal significance as bearing upon the power of Congress to determine how and at what rate the income of the joint enterprise shall be taxed."

[26] See an interesting note on the recent case which upheld the right of a state to regulate constitutionally a foreign trust doing business in that state. (1927) 41 HARV. L. REV. 86.

PROBABLE CAUSE FOR THE ISSUANCE OF SEARCH WARRANTS—It is not at all surprising that as a result of the constant efforts being made to apprehend the violators of the prohibition laws the courts are often called upon to declare what shall constitute a sufficient showing of probable cause to justify the issuance of search warrants.

The Constitution of the United States, in upholding the cherished rights of the people to security against unreasonable searches and seizures, provides in the Fourth Amendment, that

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [1]

This provision of the Federal Constitution appears in the same or in slightly varying language in all the state constitutions. Everywhere, then, throughout the United States, it is a condition precedent to the issuance of a search warrant that it be founded "upon probable cause, supported by oath or affirmation."

Probable cause is usually defined as

> "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves, to warrant a discreet and prudent man in believing that a crime is being or has been committed." [2]

The question has often arisen whether this constitutional requirement that "no warrant shall issue but upon probable cause supported by oath or affirmation" is satisfied by an affidavit or complaint which alleges that the affiant "has reason to believe and does believe" that an offense is being committed. There is a definite split of authority on this question, the majority opinion being that the issuance of a search warrant on the basis of such a complaint is violative of the constitutional provision in question,[3] since no opportunity is given to the magistrate or judge to determine whether the complainant's belief is grounded on circumstances sufficient to constitute the probable cause contemplated by the constitution. This view is based on the reasoning that the ascertainment of probable cause is a matter for judicial determination, and that the judicial officer must therefore have before

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[1] The prohibition of the Federal Constitution against unreasonable searches and seizures applies only to the Federal Government, and is not a limitation upon the powers of the states. 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 617, n.

[2] U. S. v. Lepper, 288 Fed. 136, 138 (D. C. N. Y. 1923); 2 BOUVIER, LAW DICTIONARY (1897) 763.

[3] Smoot v. State, 160 Ga. 744, 128 S. E. 909 (1925); Wallace v. State, 157 N. E. 657 (Ind. 1927); COOLEY, *op. cit. supra* note 2, at 618.

him the *facts* from which the complainant formed his belief, so that he, and not the latter, may exercise his judgment on the sufficiency of the ground shown for such belief.

> "The whole case upon which a search warrant issues must be made by him who prays for such a writ. The judicial officer before whom an application for a search warrant is filed must exercise his judicial power to determine whether or not a warrant shall issue; such judicial function can be moved only by the facts brought before him, which are under oath or affirmation. A warrant to search and seize, which follows upon a statement based solely upon the belief of the affiant, rests upon the reasoning of the affiant, based upon the secret facts of which he may have knowledge, and the conclusion which results from such reasoning is affiant's, not that of the judicial officer. The judicial process to ascertain probable cause is then transferred from the judicial officer to the affiant. The constitution permits no such thing." [4]

The other line of authority supports the doctrine that the magistrate is justified in issuing a warrant upon an affidavit of information and belief without any supporting testimony of the truth of the allegation.[5] The courts favoring this result uphold the different state statutes prescribing (1) what shall constitute a sufficient showing of probable cause and (2) that upon the filing of an affidavit that the complainant "has reason to believe and does believe" that the one accused has intoxicating liquor in his possession . . . a warrant shall issue without any further inquiry or finding by the magistrate.[6]

The majority view appears to be both safer and more logical, for to permit the complainant's belief to serve as the measure of probable cause is to have no fixed standard at all. In order to give to the citizen a real guaranty against unreasonable searches and seizures we must interpose between him and rash and unreliable accusers the judgment of a judicial officer selected by the state.

Many state legislatures have enacted special statutes which reach the result of the majority view. The Federal Statute governing search warrants, which is perhaps more definite and stringent than

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[4] Wallace v. State, *supra* note 3 at 661.

[5] Rosanski v. State, 106 Ohio St. 442, 140 N. E. 370 (1922); State v. Kees, 92 W. Va. 277, 114 S. E. 617 (1922).

[6] State v. Kees, *supra* note 5. *Contra:* State v. Peterson, 27 Wyo. 185, 194 Pac. 342 (1920). The statutes here discussed usually read as follows: "If any person shall make an affidavit before any justice of the peace or judge of any court that such affiant has reason to believe, does believe, that on any described or designated premises or tract of land, there is intoxicating liquor or a still or distilling apparatus which is being sold, bartered, used, or given away, or possessed, in violation of the laws of this state, such justice of the peace, . . . shall issue his warrant to any officer having power to serve criminal processes, and cause the premises designated in such affidavit to be searched . . . "

some of the state statutes provides, in general, (1) for the examination of the complainant and witnesses, (2) for affidavits or written depositions setting forth the facts upon which the application is claimed, and (3) that probable cause be established to the satisfaction of the judge or commissioner.[7]

The Constitution of Pennsylvania, in its first article, provides that

> "the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant, to search any place, or to seize any person or thing, shall issue, without describing them as nearly as may be, or without probable cause supported by oath or affirmation subscribed to by the affiant."

Under this constitutional provision the Pennsylvania legislature in 1923 passed a statute which provides for the issuance of search warrants under the following rules:

> "Whenever any individual makes complaint in writing before any alderman, justice of the peace, or magistrate, supported by his oath or affirmation and subscribed to by him, alleging that there is probable cause to believe, and that he has just and reasonable grounds for believing, and does believe, that intoxicating liquor is unlawfully manufactured, sold . . . . said complaint describing the said place or thing to be searched, and the thing or things to be seized, as nearly as may be, and *setting forth probable cause*, . . . the said alderman . . . if it be made to appear that there is *probable cause* for such belief, shall issue a warrant to search . . . and seize . . ."[8]

In interpreting and applying this section of the statute the Superior Court of Pennsylvania has declared that it is necessary to the validity of a search warrant that

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[7] The provision of the Federal Statute on this point is "(1) The judge or commissioner must, before issuing the warrant, examine on oath, the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. (2) The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. (3) If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant . . . ." 40 STAT. 228 (1917), U. S. C. (1925) TIT. 18, §§ 614-616.

[8] Act of March 27, 1923, P. L. 34, § 8, PA. STAT. (West, 1924 Supp.) § 14098a-8. A proviso to this section specifies that "no search warrant shall issue to search any private dwelling occupied as such, unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, boarding house, warehouse, or public garage."

(1) It should contain an allegation by the affiant that there is probable cause to believe, and that he has just and reasonable grounds for his belief.

(2) The facts upon which the affiant bases his belief and from which the judicial officer must find probable cause must be alleged.

(3) It should be made to appear to the proper official that there is probable cause for the affiant's belief before the issuance of such search warrant.[9]

The only question now remaining seems to be whether the complaint sets forth sufficient facts to persuade the magistrate that the belief was reasonable.

In *Commonwealth v. Schwartz* [10] the court upheld the sufficiency of a sworn complaint, upon which a search warrant was issued, in which the affiant stated, *inter alia,* that "there is probable cause to believe and that he has just and reasonable grounds for believing and does believe . . ." and that "he has been informed by credible persons that they have bought from the defendant intoxicating liquor at the place hereinafter described and from his own observation is satisfied that there is probable cause to believe . . ."

In finding the complaint valid the court further says:

> "The affiant is not restricted to violations of law within his own knowledge nor is he bound to set forth the names of witnesses or the details as to what they would testify. Probable cause does not import absolute certainty. It only implies reasonable grounds for belief, and the justice issuing the search warrant is the authority to be satisfied that probable cause exists."

It is interesting to note, however, that the court, by way of *dictum,* declares itself as of the opinion that had it not been for the specific provision in the act that the complaint should set forth the grounds showing probable cause, it would have been sufficient for the affiant to make affidavit that there is probable cause to believe, and that he has just and reasonable grounds for believing and does believe, *etc.* [11]

This enlightening enunciation thus indicates that but for the special statute now existing in Pennsylvania the courts would most likely have added their weight to the minority view heretofore discussed.

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[9] Com. v. Schwartz, 82 Pa. Super. 369 (1923); Com. v. Patrick Scanlon, 84 Pa. Super. 569 (1925).

[10] *Supra* note 9. Cited with approval in Com. v. Hunsinger, 89 Pa. Super. 238 (1926).

[11] The court continues: "The same provision of the constitution which protects the people from unreasonable searches also protects them from unreasonable arrests, and yet it was held in Commonwealth v. Green, 185 Pa. 641 (1898), that an information is sufficient to support a warrant of arrest where the affiant affirms to the best of his knowledge, information and belief, which is certainly no stronger than the words from the act above quoted."

It is important at this point to observe that in those jurisdictions where it is held that evidence, though obtained by an illegal search and seizure, may be admitted, the question of the validity of the search warrant is immaterial where the admissibility of the evidence obtained thereunder is involved.[12]

The courts of Pennsylvania are committed to the rule that the admissibility of evidence is not affected by the illegality of the means through which it was obtained, and "the court will not suspend the conduct of a trial to enter into a collateral inquiry as to the means through which the evidence, otherwise competent, was obtained." [13]

In addition to this the Pennsylvania Act of 1923 provides that:

> "No property rights shall exist in any intoxicating liquor or property designed for the manufacture or sale of intoxicating liquor intended for use in violating any of the provisions of this act, or which has been so used, but, upon possession or use of any such intoxicating liquor or property in violation of this act, the same shall be deemed contraband and shall be forfeited to the Commonwealth." [14]

Therefore, the courts in applying these rules hold that though the evidence in the hands of the state was secured by means of a search warrant which was defective, either because probable cause was not properly set forth or because the search warrant did not properly designate the place to be searched, or for some other reason, yet if the goods were unlawfully used, the defendant, as against the Commonwealth, could have no right to them and therefore they could be admitted in evidence against him.[15]

Perhaps it is true that one who violates the law should not receive the protection of the law, but nevertheless, from the standpoint of the constitution which endeavors to uphold the sanctity of the home against unreasonable searches and seizures, such a doctrine which permits the use of evidence obtained under an illegal search warrant, causes one to wonder how much truth there is in the oft quoted phrase, "a man's house is his castle." [16]

N. L. E.

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[12] The Supreme Court of the United States and about half the state courts have declared that evidence obtained from one accused of crime by an officer or agent of the government, by means of an illegal search and seizure, is not admissible in a criminal action against the accused. In about an equal number of states such evidence is admissible. COOLEY, *op. cit. supra* note 2, at 632.

[13] Com. v. Schwartz, *supra* note 9.

[14] Act of March 27, 1923, *supra* note 8, § 11 (West, § 14098a-11).

[15] Com. v. One Box Containing Benedictine, 89 Pa. Super. 467 (1926); Com. v. Hunsinger, *supra* note 10.

[16] "Que le meason de chescun est a luy come son castle & fortres . . . " Semayne's Case, 5 Coke 91a (1407).

WRIT OF QUO WARRANTO AS APPLIED TO CRIMINAL ACTS OF CORPORATIONS—The history of the writ of quo warranto reveals a constant tendency to increase its scope to include many situations for which, originally, it was not intended. In the beginning, available to the king or the government as a prerogative remedy, in later times, a private relator could also employ it, if the interest concerned were of a public nature.[1] England early decided that for the holding of a corporate office to be of such a nature, it had to be an office of a public corporation. In the United States, the writ was held to lie also against offices of private corporations.[2]

The tendency to increase the scope of the action is illustrated in a striking manner in the recent case of *Commonwealth ex rel. Woodruff v. American Baseball Club of Philadelphia.*[3] The defendant, a corporation, organized for playing baseball for profit, held a game on Sunday, a violation of the *Act of 1794,*[4] which prohibits worldly employment on Sunday, and provides a fine for every offense. An action of quo warranto was instituted against the baseball club, in which it was contended that playing baseball on Sunday, being a crime, was an act outside their authority and charter powers. The court held that the action was proper, and, in the face of a strong dissenting opinion, "ousted" the club from playing Sunday baseball. Mr. Justice Schaffer said for the court:[5]

> "We can think of no instance in which the attorney general can move with greater propriety to fulfil his duty . . . than in such an instance as the one before us, where one of the state's creatures avows its right and power to nullify a criminal statute. There is, and could be no implied power in a corporation to violate an act of the Assembly."

Admittedly, quo warranto lies in cases of nonfeasance or abuse of powers by a corporation, and forfeiture may be declared where there is a wilful nonuser, misuser, or a usurpation of powers not granted by the charter.[6] Further, where a corporation exercises a franchise to which it has no lawful right, the court may oust it from

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[1] HIGH, EXTRAORDINARY LEGAL REMEDIES (3d ed. 1896) § 602.

[2] HIGH, *op. cit. supra* note 1, § 653. The theory of the American courts is that any corporation chartered or organized under the laws of a state, is public in character, and any usurpation of charter powers in an abuse of the state's privilege.

[3] 290 Pa. 136, 138 Atl. 497 (1927).

[4] Act of April 22, 1794, 3 SM. L. 177, § 1, PA. STAT. (West, 1920) § 20252.

[5] 290 Pa. at 145, 138 Atl. at 500. A dictum in Kenton v. Union Passenger Co., 54 Pa. 401, was cited in support: "The company's violation of the Sunday law can be redressed only by enforcing the statutory penalty, or by proceeding in behalf of the commonwealth, against the company for misuse or abuse of its charter."

[6] FERRIS, EXTRAORDINARY LEGAL REMEDIES (1926) §140.

such exercise, without affecting the corporate franchise.[7] But it was contended by the defendant that the writ does not lie in the principal case, because the Act provided the sole penalty for the Act's violation. In support of this claim, Chief Justice Moschzisker, dissenting, said:[8]

> "The penalty and also the appropriate remedy are provided in distinct terms by the *Act of 1794* itself. If it is not a sufficient deterrent, it is for the legislature to provide another."

Certain authorities indicate, however, that such is not the general rule. Quo warranto, being a civil remedy, is applicable in a civil proceeding against a corporation, even though the acts complained of, also constitute a violation of criminal statutes.[9] The court in *State ex rel. Langer v. Gamble-Robinson Fruit Co.*[10] treated the subject at length and held that even a provision in the penal code for a cancellation of the defendant's charter, if the law were violated, did not prevent a civil remedy in quo warranto, brought for the same purpose. The court said:

> "The provision under the penal statute for annulment does not evidence a legislative intention to make the criminal remedy exclusive. A civil remedy may be brought independently of it. . . . The writ tries the right of the corporation further to hold its franchise privileges, not the question of guilt or innocence under the statute."

And this would appear to be the rule,[11] despite cases quoted by the minority, that where a penal remedy is provided for violations of the Sunday law, in the form of a fine, such violations are neither indictable[12] nor to be restrained by equity.[13]

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[7] A distinction is to be noted between the acts of a corporation which are usurpations of a franchise not granted, and acts which are *ultra vires*, but do not usurp a corporate power. 2 BAILEY, HABEAS CORPUS AND SPECIAL REMEDIES (1913), § 347.

[8] 290 Pa. at 152, 138 Atl. at 501.

[9] FERRIS, *op. cit. supra* note 6, §110.

[10] 44 N. Dak. 376, 384 *et seq.*, 176 N. W. 103, 105 *et seq.* (1919). See also State v. Delmar Jockey Club, 200 Mo. 34, 98 S. W. 539 (1906); Com. v. Smith, 271 Pa. 523, 115 Atl. 887 (1922) (mandamus).

[11] But see Com. v. Newport Turnpike Co., 29 Ky. 1285, 97 S. W. 375 (1906) where the court refused to forfeit a corporate charter by quo warranto proceedings, for charging excess tolls, because this was also a violation of a criminal law which provided adequate remedy. And in the principal case Kephart, J., dissenting, declared that the Pennsylvania Act of March 21, 1806, 4 SM. L. 332, construed in Commonwealth v. Smith, 266 Pa. 511, 109 Atl. 786 (1920), made the proceeding under the Act of 1794, *supra* note 4, an exclusive remedy.

[12] Com. *ex rel.* Barr v. Naylor, 34 Pa. 86 (1859) (Sale of liquor on Sunday).

[13] Com. v. Smith, *supra* note 11. (Bill to restrain Park Commissioners from permitting Sunday baseball.)

The difficulty with the majority opinion in the principal case, exists, it seems, in the fact that the offense of playing Sunday baseball is not in excess of the defendant's charter powers, unless any violation of law is an excess. If any violation of criminal law is in excess of charter powers, quo warranto would acquire a scope that it appears never previously to have had. For up to this time, more than a slight violation of law, whether civil or criminal, has been needed; and the writ with its verdict of ouster, will not be acted upon unless the corporation's misuser has been a substantial one.[14] It is important that the cause for the infliction of an ouster upon a corporation, either in whole, or in part, should be one that the law considers of a very serious nature.[15]

An examination of cases in which the usurpation consisted of a criminal act and for which the charter was forfeited by quo warranto proceedings, fails to support the decision in the principal case. In a series of cases the acts complained of were that the corporations in question had made agreements for the formation of pools and trusts in restraint of trade. In one [16] the defendant, organized for distilling alcohol, sold out to other corporations to create a monopoly. In another [17] the defendant conspired to form a pool for the purpose of fixing the price of beef within the state. In a third [18] there existed a combination of the defendants and others to settle the price of fruit, contrary to the penal code of the state. In all of them, such combinations being illegal, both by common law and by statute, it was held that quo warranto could be properly brought. But in all these cases, the illegal acts were also in excess of charter powers, the *ultra vires* acts consisting in these defendants permitting themselves to be controlled by agreements with others, which were far from their intended purposes when created. In *State v. Nebraska Distilling Co.*[19] it was said:

> "A corporation can only be organized under our laws for a lawful purpose, and any act done by such a corporation for the accomplishment of a purpose, not lawful, is in excess of its powers."

A different type of law violation is to be found in *First National Bank of St. Louis v. Missouri.*[20] The defendant, a federal bank, vio-

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[14] HIGH, *op. cit. supra* note 1, § 649.

[15] Com. v. Monongahela Bridge Co., 216 Pa. 108, 64 Atl. 909 (1906).

[16] State v. Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155 (1890).

[17] State v. Armour Packing Co., 173 Mo. 356, 73 S. W. 645 (1903).

[18] State v. Gamble-Robinson Co., *supra* note 10. See also the following cases in which the form of action was not discussed: People v. Milk Exchange, 145 N. Y. 267, 39 N. E. 1062 (1895); People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798 (1889); Cattle Feeding Co. v. People, 156 Ill. 448, 41 N. E. 188 (1895).

[19] *Supra* note 16.

[20] 263 U. S. 640 (1924).

lated the state law forbidding the creation of branch banks. Similarly, in *First National Bank v. Union Trust Co.*,[21] the defendant federal bank exercised a privilege given to it by the federal law to act as executor and administrator of stocks and bonds. This was contrary to the state law of Michigan. Apart from the question of the power of the state laws over federal banks,[22] it was held in both cases that quo warranto was the proper means to test the right of the banks so to act. But here again, it would appear that the acts were more than merely illegal; they were acts usurping powers not originally intended for them—in short, *ultra vires* acts of a substantial nature.

In *State ex rel. Monnett v. Capital City Dairy Co.*,[23] the defendant company had a charter to manufacture and sell oleomargarine. In so doing they made the product and wrapped it to appear to be an imitation of butter. This was a violation of the state health laws to prevent deception in the sale of dairy products. Although the criminal laws provided other punishment, it was held quo warranto lay to oust it from its charter, for what the court considered in excess of franchised powers. And it was said in *State v. Delmar Jockey Club* [24] (the case was not decided on this point) that a corporation formed to promote a county fair and hold pools for bookmaking, might forfeit its charter by quo warranto proceedings for selling pools to minors, which was expressly forbidden by law.

These two cases illustrate, perhaps, the closest approach to the decision in the principal case.[25] All three increase the use of the civil writ of quo warranto to an unprecedented extent. Not the performance of every unlawful act will constitute an abuse of privileges.[26] One is constrained to agree with Mr. Justice Kephart, dissenting in the principal case: [27]

> "The appellant was organized and chartered to play baseball. The power to perform its corporate function is there, but playing on a particular day is penalized. . . . If the legislature should see fit to remove the penalty, no new steps would be necessary to enable the club to play on Sunday. The appellant did what was within its corporate powers."

This most clearly indicates the distinction between the principal case and, with the single possible exception of *State v. Capital City*

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[21] 244 U. S. 416 (1917).

[22] For discussion of this point, see (1925) 23 MICH. L. REV. 291.

[23] 62 Ohio St. 350, 57 N. E. 62 (1900).

[24] *Supra* note 10.

[25] See State v. Nashville Baseball Club, 19 Tenn. 292, 154 S. W. 1151 (1913). Quo warranto proceedings were brought to prevent the violation of the Sunday laws, by the defendant club. The court found the Sunday laws unconstitutional, failing to discuss the procedure used.

[26] BAILEY, *op. cit. supra* note 7 at 1335.

[27] 290 Pa. at 150, 138 Atl. at 503.

Dairy Co.,[28] all the others cited. And it also propounds the most feasible test of whether or not the act in question is a usurpation of privileges: Would the corporation possess the right to do the act complained of if the statute making it a crime were removed? If it would, then the act is neither *ultra vires* nor a usurpation of a franchise. To permit quo warranto to lie nevertheless, would result in subjecting corporations to be harrassed for a multitude of petty, illegal acts.[29] Mr. Justice Kephart strikes the true note, as to this, when he says:[30]

> "Under the majority opinion, corporations that sell or print newspapers on Sunday ought to be proceeded against [by quo warranto]; telephone and telegraph companies which furnish the news are included. Indeed, if this entirely new flexible remedy is upheld as the law, it becomes the open gateway for punishment for all corporate violators of the law, be it the Sunday law or other laws. Manufacturing establishments which do not properly guard machinery, . . . concerns with large buildings and hotel companies not properly equipped with fire escapes, . . . companies that happen to employ labor illegally or work them over time, all may be proceeded against by quo warranto."

The result, undoubtedly, of such an extension of the writ, would be to degrade what was originally a prerogative remedy, exclusively, into an action for petty and minor affairs. In view of the fact that far more common and reasonable actions exist to remedy such situations, the extension is neither feasible nor desirable.

M. M. P.

RIGHT OF A DEFENDANT IN AN ACTION AGAINST HIM IN HIS PERSONAL CAPACITY BY A RECEIVER TO SET OFF DEBTS OWED HIM IN A REPRESENTATIVE CAPACITY—The Supreme Court of North Carolina has recently handed down a decision on a comparatively rare phase of the doctrine of set-off in the case of *Coburn v. Carstarphen*.[1] The defendant, a county treasurer, was indebted to a bank on two personal notes. In the bank he had a personal account, also moneys of the county in his name as treasurer. He was personally liable to the county for the money that had come into his hands. The bank knew that the funds deposited by him as treasurer were trust

[28] *Supra* note 23.

[29] See State v. Regents of University, 55 Kan. 389, 40 Pac. 656 (1895) where quo warranto proceedings lay to prevent the charging of a five dollar library fee in a free state university.

[30] 290 Pa. at 150, 138 Atl. at 503.

[1] 139 S. E. 596 (N. C. 1927).

funds. The bank became insolvent, and its receiver [2] sued on the defendant's personal notes. The court held that the defendant was entitled to set off both his personal deposits [3] and those made by him as trustee against the plaintiff's claim.

When considering any application of the doctrine of set-off, it is well to bear in mind the historical background. At common law, set-off was unknown—If A owed B £10 on one contract, while B owed A £10 on another, the set-off would be unavailing, and either one might get a £10 judgment against the other.[4] In chancery the principle of set-off arose to avoid multiplicity of actions [5] and many years later, courts of law by statute were enabled to allow the remedy.[6]

But, although in law set-off is a purely statutory creature, statutes in the various jurisdictions both here and in England [7] are, for the most part, strikingly similar. Generally the requirement is that the debts be mutual, and owing in the same right.[8] In equity the rules are more flexible, since many persons may be made parties to a bill, and the decree framed to accomplish a short cut to a just all-inclusive settlement. Courts of law, in the interpretation of their statutes, have been much affected by the willingness of equity to apply set-offs without a strict regard for mutuality.[9] *A fortiori,* the law courts are less strict where they have been given part or full equitable powers.

With regard to the requirement of mutuality, it has generally been held that one cannot set off debts due him as trustee when being sued in his individual capacity,[10] nor can the plaintiff apply the same, for the crossing debts are not due in the same right.[11] In personal suit

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[2] The receiver sues under the same rights as his insolvent. He is not a purchaser for value, and acquires no greater rights than his transferror. People v. California Trust Co., 168 Cal. 241, 141 Pac. 1181 (1914); 23 R. C. L. 56; MORSE, BANKS AND BANKING (5th ed. 1917) 633..

[3] The remainder of this note does not discuss the right of a depositor to set off his personal account against debts of the insolvent bank. His right to do so seems now so well settled as to be indisputable. 3 R. C. L. 529, 647; 4 R. C. L. 655; 7 C. J. 652; and see (1915) 3 VA. L. REV. 72. For a brief summary of this development see (1915) 13 MICH L. REV. 512.

[4] McLean v. McLean, 1 Conn. 397 (1815). See also 34 CYC. 636; WATERMAN, LAW OF SET-OFFS (1869) 10.

[5] 34 CYC. 633; WATERMAN, *op. cit. supra* note 4, 17.

[6] 34 CYC. 636. For a comprehensive study see Lloyd, *Development of Set-off,* (1916) 64 U. OF PA. L. REV. 541.

[7] Although a very few set-off statutes existed in the Colonies before passed by the English Parliament, most such American statutes are patterned upon 2 GEO. II c. 22, perpetuated by 8 GEO. II, c. 24, §4. 34 CYC. 622. See also article, 64 U. OF PA. L. REV. *supra* note 6.

[8] Fidelity Co. v. Poe, 147 Md. 502, 128 Atl. 465 (1925); See also Weiss v. Wahl, 5 Mo. App. 408 (1878); 34 CYC. 712 *et seq.* and cases cited.

[9] See WATERMAN, *op. cit. supra* note 2, 4, 25.

[10] Middleton v. Pollock, L. R. 20 Eq. 29 (Eng. 1875). But see Wolf v. Beales, 6 Serg. & R. 242 (Pa. 1920); WATERMAN, *op. cit. supra* note 4, 45.

[11] MORSE, BANKS AND BANKING (5th ed. 1917) § 334, and note 2.

against an executor or administrator, the defendant cannot set off debts due the estate,[12] and a public officer is not permitted to plead a debt due him in his official capacity, when being sued on a personal obligation.[13]

Then why, if at all, should the defendant be allowed greater freedom when sued by the receiver of an insolvent? Some courts answer that insolvency is a special equity which justifies application of a different rule,[14] and the majority seem to allow the set-off.[15] One of the few authorities in point is an early New York case [16] in which a city official had deposited a fund partly his own, partly the city's in the now insolvent bank. In a decision citing very little precedent [17] he was allowed to set off this account against his personal debt to the bank. In a later New York case [18] the Supreme Court allowed one sued as trustee by the receiver of an insolvent bank to set off his individual claim against the bank, but the decision was reached by reliance on the admittedly broader wording of an intervening statute,[19] and the seeming exclusive reliance placed thereon, might seem to indicate that the general law was otherwise.[20]

A Pennsylvania case, citing no authority,[21] contains language implying that a set-off should not be allowed under such circumstances as existed in the *Coburn* case. The court allowed one who had carried a deposit of trust funds in his own name, as "X, assignee" to set off this amount against an insolvent bank, on an individual debt, but the court laid great stress on the bank's apparent lack of knowledge as to who was the *cestui que trust,* and assumed that addition of the word "assignee" did not give notice of a special fund. They practically treated this as a personal account of the defendant. Judging from their language, the court might have decided otherwise if the bank had known the exact nature of the deposit, as the bank

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[12] Farris v. Houston, 78 Ala. 250 (1884); People v. California Trust Co., *supra* note 2; 34 Cyc. 722.

[13] Bayliss v. Pearson, 15 Iowa 279 (1863); 34 Cyc. 723.

[14] Hamilton v. Van Hook, 26 Tex. 602 (1862); 34 Cyc. 633.

[15] See note 25, *infra.*

[16] Miller v. Receiver of Franklin Bank, 1 Paige 444 (N. Y. 1829).

[17] Only two earlier cases, both English, were cited. One of these related only to settling of estates, and the other to settling of partnership business after death of one partner.

[18] Pandergast v. Greenfield, 40 Hun 489 (N. Y. 1886).

[19] New York Code of Civil Procedure, §501, as re-enacted 1877.

[20] A still later New York case of People v. German Bank, 116 App. Div. 607, affirmed without opinion 192 N. Y. 533; 84 N. E. 117 (1908), is cited in 5 A. L. R. 84 and 7 C. J. 745 as contrary to the above rule of the Miller case. There is dictum to that effect, but the court distinguished it on the ground that the defendant had no personal interest in the fund as he did in the earlier case. However, it seems a very real distinction lies in that the deposit in the latter case was owed to three trustees jointly, and was attempted to be set off in a suit where only one of them was a party defendant.

[21] Laubach v. Leibert, 87 Pa. 55 (1878).

knew it in the *Coburn* case. Cases and dicta in Pennsylvania up until very recently have been in seeming conflict and clouded with uncertainty. Upon the very same authorities the Superior and Supreme Courts of this state reached opposite conclusions. In the case of *Hunter v. Hemming*,[22] the plaintiff was receiver of an insolvent bank, and sued the defendant on personal notes. The defendant admitted liability, but attempted to set off two accounts which he had in the bank, one in his name as "Executor of the will of A"; the other as "Trustee for J." The trial court refused to allow the set-off; the Superior Court allowed it, only to be reversed by the Supreme Court, which said:

> "The manifest effect of allowing such a set-off would be to enable a debtor to pay a debt of his own with money belonging to other people. This cannot receive judicial sanction."

Under such a clear and recent decision on the point, it seems reasonable to conclude that the set-off would not be permitted in Pennsylvania today.

A perusal of those cases which allow the set-off shows courts have been influenced by an argument that the set-off should be applied provided the rights of third persons are not injured. Frequently there are found implications and expressions to that effect. But, of necessity, are not the rights of others always affected? There will be less in assets of the insolvent for distribution, with the result that creditors will be proportionately cut off. Courts answer by saying that to allow the set-off merely settles the account between those having legal title. It is submitted that this is not a sufficient answer, for as was seen, statutes generally require that the debts be owed in the same right, so if the remedy be allowed at all, it must be on equitable grounds independent of law. But, by hypothesis, courts applying equitable doctrines should look to the parties having beneficial interest, rather than to those with bare legal title. In these insolvency cases, some innocent party loses, so it might be better and more logical to refuse the set-off,[23] for the equities seem at least balanced, if not in favor of the creditors at large of the insolvent.

If, as in the principal case, the trustee is absolutely liable, as opposed to the usual liability of the trustee,[24] for any loss which may occur to the fund, this point might be sufficient to warrant a different conclusion, but while the court at some length discussed the defendant's responsibility for all moneys received, the decision does not seem to be put squarely on that ground. Most of the other cases cited fail

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[22] 259 Pa. 347, 103 Atl. 61 (1918), reversing 64 Pa. Super. Ct. 366 (1916). It is interesting to note the review of cases given by both courts, and note how the same authorities are relied on for opposite conclusions.

[23] In view of the argument that law adheres to strict mutuality, and equity should take cognizance of only the beneficial ownership.

[24] PERRY, TRUSTS (6th ed. 1911) § 443-5.

even to indicate the extent of the trustee's liability. Where mentioned at all, the point is disposed of in a sentence or two. It is submitted that this liability is of importance. The causes so often advanced for refusing the set-off, unfair preference over other creditors, and permitting defendant to pay his own debts with another's money, are not present. If the defendant cannot avail himself of the right, the direct loss is his. The relation between him and his *cestui que trust* assumes also the nature of debtor and creditor. Then does not the fund so far become his own that for the purpose of this kind of case one can say that the fund is his, and debts between the plaintiff and defendant are mutual?

On this fact, it seems, the *Coburn* case is distinguishable from the others, but unfortunately courts have not in their decisions shown whether this point may be a controlling factor. Independently of it, the majority allow a trustee to set off debts owed him in a representative capacity, where the plaintiff represents an insolvent.[25]

I. F. H.

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[25] Funk v. Young, Trustee, 138 Ark. 38, 210 S. W. 143 (1919), with annotation and cases cited, 5 A. L. R. 79.